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| **Christian Legal Society v. Martinez**  **561 U.S. \_\_\_ (2010)**  **The Supreme Court Holds That Denying Recognition of a Religious Student Organization Does Not Violate the First Amendment**  **by Kerry Brian Melear University of Mississippi**   On June 28, 2010, the United States Supreme Court rendered its long-awaited decision in *Christian Legal Society v. Martinez*, concluding that the Hastings Law School (Hastings), a public California institution, did not violate a student group's constitutional rights when it denied the Christian Legal Society (CLS) official recognition because it discriminated on the basis of religion. The members of CLS sought to exclude potential members who did not share their religious beliefs, particularly with regard to pre-marital sexual activity and homosexuality. In a broader sense, the Court concluded that an all-comers policy applied to student organizations does not run afoul of the First Amendment if the policy is reasonable and viewpoint-neutral. The 5-4 decision was authored by Justice Ginsburg, who was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor, with Justices Stevens and Kennedy filing concurring opinions. The dissent was authored by Justice Alito, who was joined by Chief Justice Roberts and Justices Scalia and Thomas.   The Supreme Court focused its inquiry on the following question: "May a public law school condition its official recognition of a student group --- and the attendant use of funds and facilities --- on the organization's agreement to open eligibility for membership and leadership to all students?" (p. 1)   The Hastings Law School offers official recognition to student organizations, as well as the attendant benefits of that recognition, including financial assistance, communication, office space, and use of the school logo, to groups that are willing to abide by the Law School's Policy on Nondiscrimination. This policy tracks California state law and forbids discrimination on a number of bases, including religion and sexual orientation. Hastings interprets the policy to compel the acceptance of all-comers, or any student who wishes to join any organization. (pp. 3-4)   CLS sought official recognition as a student group, but was denied by Hastings because CLS required it members to adhere to a statement of faith directing that sexual activity should not occur outside of the marriage between a man and woman. The organization thus sought to exclude from its membership anyone who engages in "unrepentant homosexual conduct" or others who simply did not affirm these beliefs. Hastings deemed this practice a violation of the nondiscrimination policy. (pp. 5-6)  CLS filed suit against Hastings in 2004, arguing that the denial of recognition violated its constitutional rights to free speech, expressive association, and free exercise of religion. A federal district court concluded that registered student organizations at Hastings represented a limited public forum and that the all-comers policy was a reasonable and viewpoint-neutral condition on access to the forum. The court also concluded that the policy did not impair CLS's expressive association rights, noting that Hastings did not direct CLS to admit any student; it simply conditioned access to its facilities and funds on compliance with the policy. Thus, CLS was not prevented from meeting and communicating as a group. The district court also rejected CLS's free exercise argument, finding that the nondiscrimination policy did not target religious beliefs, but was neutral and general in nature. CLS appealed the ruling, and the Ninth Circuit affirmed. (pp. 6-7)   The majority opinion began its analysis of the case by noting that the nondiscrimination policy itself was not under review, although CLS urged the Court to review the language of the policy. Writing for the majority, Justice Ginsburg relied on a stipulation of facts agreed to by both parties, in which they specified that Hastings required that student organizations allow any student to participate. Thus, the focus of this inquiry was only toward whether conditioning access to a student organization forum on compliance with an all-comers policy frustrated the First Amendment. The Court concluded that it does not. (pp. 9-12)   CLS argued that its free speech and expressive association claims should be separately analyzed. However, the Court articulated three reasons why the limited public forum doctrine was the proper fit and why the claims should be held to the same standard of scrutiny: the claims arise in exactly the same context, strict scrutiny would effectively invalidate a defining characteristic of the limited public forum (that they may be reserved for certain groups), and the expressive association precedent on which CLS relied involved regulations compelling a group to include unwanted members, when in this case, CLS was free to exclude applicants by foregoing official recognition and funding. (pp. 14-16). "In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less-restrictive limited public forum analysis better accounts for the fact that Hastings, through its RSO (registered student organization) program, is dangling the carrot of subsidy, not wielding the stick of prohibition." (p. 16).   Under limited public forum analysis, a policy restricting speech must be reasonable and viewpoint-neutral. The majority found the all-comers policy to be reasonable, allowing for some deference to the judgment of university administrators, a philosophy found unpalatable by Justice Alito in his dissent. The majority found that the policy opened access to the benefits of student organizations to all students, helped Hastings regulate the written provisions of the nondiscrimination policy, encouraged a diversity of backgrounds and beliefs, and tracked state nondiscrimination law. The Court also found that the numerous alternative channels for communication provided by Hastings, which allowed access to some of its facilities to unregistered organizations, buttressed the policy's reasonableness. (pp. 21-23). Similarly, the Court found the policy to be utterly neutral in view: "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* students groups to accept *all* comers." (p. 28)   The majority opinion concluded by declining to address CLS's contention that Hastings selectively applied the all-comers policy because neither lower court addressed the issue, remanding the claim to the Ninth Circuit. (p. 31). The concurring opinions filed by Justices Stevens and Kennedy supported the policy's general applicability to all students, regardless of viewpoint.   In a lengthy dissenting opinion, Justice Alito, joined by the Chief Justice and Justices Scalia and Thomas, took issue with the record as presented and focused considerable attention on the notion that constitutionality of the nondiscrimination policy itself should have been under review rather than the all-comers policy. (p. 7, dissent). He also found issues with the record regarding the genesis of the all-comers policy, arguing that it was only articulated by Hastings after the litigation had begun. (pp. 6-7, dissent). Justice Ginsburg, however, in the majority opinion, recognized his attempt to recast the matter and pointed succinctly to the stipulation of facts to which both parties had agreed and entered into record: Hastings required all student organizations to accept any student. In stinging language, she characterized the dissent's doubt regarding the factual record and statements made by the Hastings dean and a student affairs administrator as "a one-sided summary of the record evidence, an account depending in large part on impugning the veracity of a distinguished legal scholar and a well respected school administrator." (p. 32). For his part, Justice Alito, who argued that the majority had ignored facts that could lead to a finding of viewpoint discrimination on Hastings's part, concluded that he could "only hope that this decision will turn out to be an aberration." (p. 37, dissent). | |

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|  | **Administrator's Perspective** |
| **Brad Colwell, Dean and Professor**  **Bowling Green State University**   On the surface, school administrators should appreciate the Court's decision for its clear legal direction. The majority court basically indicated that public institutions can only officially recognize clubs/organizations that have membership criteria that are open to "all comers." However, a more detailed review may leave an administrator with questions regarding mandating that recognized clubs and organizations accept every member that meets the club's membership criteria. Specifically, should a group such as the College Republicans or College Democrats be forced to accept members from other political parties - assuming their lone purpose is to cause a disruption or learn "insider" information? Even though the Court addressed this very argument, in practice, administrators could find this may cause great angst among club members.  Unlike elementary and secondary school administrators, those in higher education deal with adult students. This decision is somewhat inconsistent with basic tenets of higher education: adults are supposed to be open to other ideas and tolerate those with whom they disagree. Even though neutrality is a noble concept, it would seem that higher education is the one place where public funds can be used to support groups/ideas with which others may not agree. The obvious issue, though, becomes one of conscience: should public monies be used to support extreme messages?  In summary, it appears that for administrators, the rule of law is relatively clear, but the implementation--especially for college and university administrators--could prove to be more problematic. Only time will tell! | |

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|  | **Attorney's Perspective** |
| **Donna Gurley Associate University Attorney - University of Mississippi**   As Associate University Attorney for the University of Mississippi, I serve on a committee that reviews requests by student organizations for official recognition by the university.  As a member of that committee, I have experienced first-hand the tension between freedom of speech and the enforcement of non-discrimination policies.  Justice Ginsburg's opinion in Martinez relies heavily on the parties' stipulation that the Hasting's policy was an "all-comers" policy requiring student organizations to accept any student seeking membership.  Since the policy passing judicial scrutiny was an all-comers policy (rather than a non-discrimination policy with a list of protected classes), it makes sense for college and university administrators to review their student organization policies and adopt an all-comers policy if possible.  While policies that list protected classes may be found constitutional by the Court sometime in the future, there are suggestions that the opposite may be true.  Another piece of advice is to enforce the policy uniformly:  Hastings won the case even though the administration had only refused recognition of one organization (CLS) under its policy.  The next institution might not be so lucky.   As someone who works with student affairs professionals, I agree with the Martinez opinion.  I see a difference between the limited forums that we create for student organizations and the world beyond our campuses.  Because our students come to us while they are still developing and vulnerable, we have a duty to enact some reasonable, viewpoint-neutral rules that protect both individual students and diversity.  Still, I can also understand that compelling organizations to accept members who do not share its core beliefs is the antithesis of freedom of association.  Let's hope that the fear of student organizations' being taken over by individuals with different views proves to be unfounded. | |

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|  | **Professor's Perspective** |
| **Kerry Brian Melear**  **University of Mississippi**   The Supreme Court's recent decision in *Christian Legal Society v. Martinez* was bitterly divided, narrowly focused, and left issues unexplored that will surely emerge again in litigation. The majority opinion, authored by Justice Ginsburg, found that an all-comers policy was a reasonable and viewpoint-neutral condition on access to a limited public forum. The Christian Legal Society (CLS) and the dissent urged the Court to consider other factors, such as the institution's actual non-discrimination policy, but that policy was not examined because of a stipulation of facts agreed upon by both parties.   However, it is the non-discrimination policy itself that would have made for the more interesting constitutional analysis, and would have provided considerably more applicable guidance to higher education administrators had it been scrutinized, given the number of non-discrimination policies embraced by U.S. colleges and universities. Institutions would be wise to review current non-discrimination policies and their implementation across campus functions such as student organizations to ensure they do not frustrate student free speech or association rights. The Supreme Court has concluded that an all-comers policy can be a reasonable condition on access to a limited public forum. However, this opinion provided no guidance with regard to the Court's posture toward the non-discrimination policy itself. Universities should also ensure that any policies are consistently applied, which is an issue that was remanded to the Ninth Circuit in this circumstance.   From a teaching perspective, the opinion will be useful in several ways, such as continuing the discussion of forum analysis, particularly with regard to the limited public forum, and presenting students with a critical framework for discerning key issues as presented and argued. The bitter division of the Court and the strident barbs launched in both the majority and dissenting opinions will also remind graduate and law students that these issues are never easily dispensed.   I am presently teaching my annual Comparative Higher Education course in England, a country that operates state-funded religious schools of numerous denominations, and today toured one of the constituent colleges of the University of London. We were guided by a student ambassador and, during the tour, she mentioned that she was a member of a religious society (student organization) for Hindu students, so I took a moment to pose a hypothetical to her at the end of the tour:   "If a student applied for membership in your religious student organization who was not a Hindu or did not embrace any Hindu beliefs, would your members reject the application?"   Her answer, given without hesitation, spoke volumes for our cultural divide regarding religion and education:   "Of course not---why would we? Any student interested in our religion strengthens our diversity."   A refreshingly simple answer to a complex question for U.S. colleges and universities.  Source: Delivered via email from Education Law Association. | |